(5)

No. 06-465

Supreme Court, U.S.
FILED
OCT 31 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION OF METROPOLITAN CHICAGO, AMERICAN LUNG ASSOCIATION OF THE UPPER MIDWEST, AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY OF ILLINOIS, AMERICAN ACADEMY OF OTOLARYNGOLOGY – HEAD AND NECK SURGERY, AMERICAN THORACIC SOCIETY, ILLINOIS STATE MEDICAL SOCIETY, ONCOLOGY NURSING SOCIETY, AMERICAN HEART ASSOCIATION, AND AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOEL J. AFRICK
PRESIDENT AND CHIEF EXECUTIVE OFFICER
AMERICAN LUNG ASSOCIATION OF METROPOLITAN CHICAGO
1440 W. Washington Blvd.
Chicago, Illinois 60607
(312) 628-0220

MICHAEL W. COFFIELD
Counsel of Record
MICHAEL W. COFFIELD AND ASSOCIATES
77 W. Wacker Dr., Ste 4800
Chicago Illinois 60601
(312) 444-9393

October 31, 2006

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a negotiated Federal Trade Commission consent order operates, as a matter of federal law, as a safe harbor immunizing non-parties to the consent order from liability under otherwise applicable state law for conduct similar to that permitted under the order.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

NATURE OF THE CASE 5

I. The Consequences of Philip Morris's Actions Go Far Beyond the Damages Found Below to Cigarette Consumers 8

A. The public health consequences of smoking have been devastating 9

B. The economic consequences of smoking in the United States have been substantial and durable 11

II. Philip Morris's Fraudulent and Deceptive Advertising Campaign Was Pivotal to Its Strategy To Promote Smoking 11

A. The fraudulent marketing of cigarettes as lower delivery and lower risk products is an urgent public health issue 12

B. The Illinois trial court's findings regarding Philip Morris's fraud are supported by a growing nationwide and worldwide consensus of health authorities 15

III. The Divided Decision of the Illinois Supreme Court Warrants Review by this Court 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Metz v. Department of Professional Regulation, 773 N.E.2d 1234 (Ill. Ct. App. 2002) 14

Chicago Steele Wool & Dye Fabricators Co. v. ADT Security Systems, 763 N.E.2d 839 (Ill. Ct. App. 2002) 14

STATUTES AND RULES

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2 ..... 5, 18, 19

Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2 5

Sup. Ct. R. 37.6 1

INTERNATIONAL CONVENTIONS

Framework Convention on Tobacco Control (http://www.paho.org/English/AD/SDE/RA/FCTC_Booklet_english.pdf) 16

ADMINISTRATIVE MATERIALS

Centers for Disease Control and Prevention:

Adult Cigarette Smoking in the United States: Current Estimates, December 2005 (http://www.cdc.gov/tobacco/factsheets/adultcigarettesmoking_factsheet.htm) 10

Annual smoking-attributable mortality, years of potential life lost, and economic costs in the United States, 1995B1999, *MMMWR* 2002; 51:300B303 (http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf) 11

Cigarette Smoking-Attributable Morbidity – U.S., 2000, MMWR Vol. 52(35) (Sept. 5, 2003) (http://www.cdc.gov/tobacco/research_data/adults_prev/ mmwr5235a4.htm) 9

Cigarette Smoking Related Mortality, 2001 (http://www.cdc.gov/tobacco/research_data/health_consequences/mortali.htm) 9

Perspectives in disease prevention and health promotion, smoking attributable mortality and years of potential life lost – United States, 1984, 46 Morbidity and Mortality Weekly Report 444-51 (1997) 10

Sustaining State Programs for Tobacco Control: Data Highlights 2004 (http://www.cdc.gov/tobacco/datahighlights/page4.htm) 10

The Health Consequences of Smoking, a Report of the Surgeon General, 2004 (www.cdc.gov/tobacco/sgr/sgr_2004/factsheets/4.htm) 10

Tobacco Information and Prevention Source (http://www.cdc.gov/tobacco/overview/fast_facts.htm) 11

Tobacco-Related Mortality, 2004 (www.cdc.gov/tobacco/factsheets/tobacco_related_mortality_fact sheet.htm) 9

Federal Trade Commission:

Cigarette Report for 2003 (2005) (http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf) 12, 14

FTC Consumer Alert: Up in Smoke: The Truth About Tar and Nicotine Ratings (May 2000) (http://www.ftc.gov/bcp/conline//pubs/alerts/smoke alrt.htm) 13

National Cancer Institute, Monograph 13, "Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine" 6, 13, 14

U. S. Department of Health and Human Services, *The Health Consequences of Smoking, 2004* (http://www.hhs.gov/surgeongeneral/library/smoking consequences/) 16

OTHER MATERIALS

American Lung Association, *Secondhand Smoke and Children Fact Sheet* (http://www.lungusa.org/site/pp.asp?c=dvluk9O0E&b=39857) 9

Harris, Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8*, British Med. J. 328:72, 2004..... 15-16

LS Miller, et al., *State estimates of Medicaid expenditures attributable to cigarette smoking, Fiscal Year 1993*, 113 Public Health Reports 140-51 (1998) 11

National Center for Tobacco-Free Kids, *The Toll of Tobacco in Illinois* (http://www.tobaccofreekids.org/reports/settlements/state.php?StateID=IL)..... 12

World Health Organization:

http://www.who.int/tobacco/framework/countrylist/en/index.html 17

http://www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en/..... 17

INTEREST OF THE *AMICI CURIAE*[1]

Amici are non-profit public health organizations and professional medical societies that for decades have confronted the devastating health and economic consequences of tobacco use. Hence, *Amici* are especially qualified to assist this Court in comprehending the gravity of Philip Morris's actions in deceptively producing and promoting so-called "Light" and "Lowered Tar and Nicotine" cigarettes, as found by the trial court, below.

Amici address this Court in order to place the proceedings below in their broader context, and to emphasize the consequences of the fraud and deception committed by Philip Morris. These consequences are not limited to the economic interests of those who purchased cigarettes in Illinois. Rather, the consequences of Defendant's actions upon the physical and economic health of all citizens of the United States are immediate and devastating, and will reverberate for decades to come.

The American Lung Association is over 100 years old and has offices and hundreds of thousands of volunteers in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The American Lung Association of Metropolitan Chicago and American Lung Association of the Upper Midwest are constituents of the national office of the American Lung Association and two of the oldest 501(c)(3) non-profit voluntary health organizations in Illinois.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represent that they authored this brief and that no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *Amici* represent that counsel for all parties have consented to the filing of this brief. Petitioners and the Respondent Law Schools have filed letters with the Clerk granting blanket consent to any party filing an amicus brief in support of either Petitioners or Respondents, and a letter reflecting Respondent Philip Morris's consent to the filing of this brief has been filed with the Clerk.

The collective mission of the American Lung Association is to reduce lung disease and promote lung health through research, education, and advocacy. They have long been active in research, education, and public policy advocacy on the adverse health effects of tobacco use, and have worked to assist smokers in their cessation efforts through the Illinois Tobacco Quit Line (1-866-QUIT-YES) and their Freedom from Smoking Online program (www.ffsonline.org).

The American Cancer Society is the world's largest voluntary health organization with a membership of three million, including many victims of tobacco-caused cancer and their family members. The American Cancer Society has representation in every state and is dedicated to eliminating cancer as a major health problem through research, education, advocacy, and service. The organization has been a leader in research on the relationship between tobacco and cancer, and it devotes substantial resources to research, public education, and direct service to those suffering from cancer caused by tobacco.

The American Academy of Otolaryngology – Head and Neck Surgery ("Academy") is a non-profit organization representing more than 10,000 otolaryngologists – head and neck surgeons who diagnose and treat disorders of the ears, nose, throat, and related structures of the head and neck. The medical disorders treated by the Academy's physicians and this specialty are among the most common that afflict all Americans, young and old (including neck cancer).

The American Thoracic Society ("ATS"), founded in 1905, is an independently incorporated, non-profit, educational, and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. ATS has approximately 13,500 dues-paying members around the world who help prevent and fight respiratory disease internationally through research, education, patient care, and advocacy. The long-range

goal of ATS is to decrease morbidity and mortality from respiratory disorders and life-threatening acute illnesses. Although ATS members work on diverse issues, all share an interest in the health effects of tobacco-related disease.

ATS is a primary scientific body that conducts studies, publishes research, and advises physicians on the health effects of tobacco. ATS implements its mission principally through four major activities: 1) scientific journals, 2) medical statements, 3) the ATS International Conference, and 4) continuing medical education credits. ATS publishes two highly respected academic journals on lung disease called *The American Journal of Respiratory and Critical Care Medicine* ("AJRCCM") and *The American Journal of Respiratory Cell and Molecular Biology* ("AJRCMB"). Both journals include studies of health effects caused by tobacco. AJRCCM and AJRCMB are featured frequently in the mainstream and trade press, and the Science Citation Index ranks the journals first and second, respectively, filtered under "respiratory system." In addition to publishing research studies, ATS also publishes medical statements that give expert opinion on how to diagnose and treat lung-related diseases, such as asthma, chronic obstructive pulmonary disease, occupational lung disease, and other lung diseases that are caused by or exacerbated by tobacco.

The Illinois State Medical Society ("ISMS") is a non-profit, professional organization comprised of over 12,000 practicing physicians, medical residents, and medical students. ISMS membership encompasses practicing physicians from a broad range of specialties, geographic locations, and types of practice. ISMS, by virtue of being the most broadly based professional association representing Illinois physicians, has a vital interest in resolution of public health issues facing the citizens of Illinois.

The Oncology Nursing Society ("ONS"), the largest professional oncology association in the world, is composed of more than 33,000 registered nurses and other

healthcare providers dedicated to excellence in patient care, education, research, and administration in oncology nursing. As tobacco use is responsible for one in three cancer deaths in the United States, ONS has long-standing policy regarding the regulation of tobacco products to help reduce and prevent tobacco-related disease, disability, and death. ONS maintains a steadfast commitment to supporting policies, programs, and other efforts that seek to reduce adult and youth tobacco use, promote tobacco cessation, protect nonsmokers against secondhand smoke, and help increase access to tobacco use prevention and cessation services.

The American Heart Association ("AHA") is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke, which are the #1 and #3 largest killers of Americans. AHA is one of the world's premier health organizations, with 22.5 million volunteers and supporters in nearly 2,000 community organizations in the 50 states as well as in Washington, D.C. and Puerto Rico. The association invested more than $473.5 million in fiscal year 2004-05 for research, professional and public education, community service, and advocacy so people across America can live stronger, longer lives. AHA has long been active before Congress and regulatory agencies on tobacco and other health- related matters.

Founded in 1872, the American Public Health Association ("APHA") is the oldest, largest, and most diverse organization of public health professionals in the world. The association aims to protect all Americans and their communities from preventable, serious health threats and strives to assure community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States. APHA represents a broad array of health providers, educators, environmentalists, policy-makers, and health officials at all levels working both within and outside governmental organizations and

educational institutions. APHA advocates for FDA's authority to regulate tobacco and all tobacco products and supports improving the public's health through a comprehensive approach to preventing tobacco use among children and teens, helping current tobacco users quit, and protecting the public from the impact of second-hand tobacco smoke.

NATURE OF THE CASE

The Supreme Court of Illinois, in a narrowly divided decision, reversed a state trial court judgment that defendant Philip Morris had violated provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2, and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2, in connection with the manufacture, promotion, and sale of "Light" and "Lowered Tar and Nicotine" cigarettes in the State of Illinois.

From the public health point of view, the Illinois Supreme Court's decision is deeply disturbing. The Light Cigarette fraud perpetuated on the American public was one of the most heinous health frauds carried out in this nation's history. As the trial court held, Philip Morris deliberately created "a disinformation environment" in response to growing awareness of the health consequences of smoking over a period of decades. Judgment, ¶29; A. 174,[2] whereby the company "knowingly and falsely disputed scientific conclusions that established a connection between smoking and diseases." *Id.*

Not content with a strategy of disinformation alone, starting in 1971, Philip Morris began marketing "Light" and "Lowered Tar and Nicotine" cigarettes in Illinois, Judgment, ¶9; A. 169, "with the intention of

---

[2] All citations to the circuit court's Judgment below include references to both the relevant paragraph of the Judgment and the corresponding page(s) of the Judgment, which has been reproduced in the Appendix filed by Petitioners. References to the Appendix are denoted as "A. _."

communicating to consumers that [these products were] less harmful or safer" than their regular counterparts. Judgment, ¶30; A. 174. Indeed, the trial court found that Philip Morris introduced its brands of "Light" cigarettes to the market "with the intent to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes." Judgment, ¶31; A. 175. As a factual matter, the court found "Philip Morris intended to deceive consumers into believing" that their "Lights" "were less harmful or safer than their counterparts." Judgment, ¶33; A. 175.

"Class members universally understood the message of reduced risk from these products." Judgment, ¶38; A. 176. *See also* Judgment, ¶¶39-44; A. 176-78. Relying on that "message," they purchased the "Light" brands in increasingly large volume.

According to the trial court, Philip Morris's fraud and deception were not limited to its customers. Defendant actively misled government regulators and the public health community by withholding its "specific scientific and cigarette design knowledge" that revealed that "Light" and "Lowered Tar and Nicotine" cigarettes were in fact *more* harmful than regular cigarettes. Judgment, ¶¶54-55; A. 181-82. Indeed, Philip Morris shamelessly "took advantage" of the public health community's lack of accurate information to further perpetuate its fraud and deception on consumers. Judgment, ¶55; A. 182.[3]

---

[3] The publication in October 2001 of the National Cancer Institute's Monograph 13, "Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine" ("Monograph 13"), confirmed the emergence of a public health community consensus that lower machine measured yields of tar and nicotine in fact did not lower the risk of disease from smoking. *See* Judgment, ¶ 79; A. 188. As the trial court found, prior to that time "the public health community was among those deceived [by Philip Morris]." Judgment, ¶ 81; A. 189-90. The trial court therefore correctly concluded that Philip Morris's

The false perception of "healthier smoking" that was carefully nurtured by Philip Morris had devastating consequences. According to the court, it led existing smokers to "delay cessation" of their smoking, and more non-smokers to initiate smoking. Judgment, ¶69; A. 186. Philip Morris undertook its actions with full knowledge that its "Light" brands did not lead to "disease reduction." Judgment, ¶68; A. 185. Indeed, quite to the contrary, Defendant knew that "Lights" were "actually more harmful and more hazardous" than their regular counterparts. Judgment, ¶70; A. 186. Finding the evidence "persuasive and disturbing," the trial court concluded that "Light" cigarettes were more mutagenic, Judgment, ¶¶71-74; A. 186-87, that their specific toxicity was greater than that of regular cigarettes, Judgment, ¶¶75-77; A. 187-88, and that both facts were well known to Philip Morris, Judgment, ¶¶75-77; A. 187-88. The consequence of their development and deceptive marketing, therefore, was a dramatic increase in the incidence of adenocarcinomas – and the testimony to support that finding was entirely unrebutted by Philip Morris. Judgment, ¶78; A. 188.

In reaching those stunning conclusions, the trial court observed that Philip Morris frequently offered no evidence to defend its actions, *see, e.g.*, Judgment, ¶¶63, 80; A. 184, 189, or proffered evidence that was implausible and/or unpersuasive, *see* Judgment, ¶¶40, 45, 47-48, 53, 59, 65, 73; A. 176-79, 181, 183, 185, 187.

As *Amici* more fully describe below, the consequences of Philip Morris's reprehensible campaign were not limited to the consumers who paid for "Light" cigarettes fully believing that they were purchasing a healthier product. Increased smoking and disease rates have had profound consequences on the health of the citizens of Illinois and

---

attempt to defend its actions based on earlier statements from the public health community in support of Light cigarettes is "morally abhorrent and factually incorrect." *Id.*

all of the United States, and upon the economic stability of our health care delivery system. For these and other reasons discussed herein, *Amici* urge the Court to grant the petition and reverse the decision of the Illinois Supreme Court.

I. The Consequences of Philip Morris's Actions Go Far Beyond the Damages Found Below to Cigarette Consumers.

Like any product, cigarettes are sold in markets that rely on accurate information to facilitate informed consumer choice about their purchasing decisions. When consumers are deceived or defrauded as they were here, they cannot make informed choices. They will instead demand more of certain products than they otherwise would if they were accurately informed of the product's characteristics and the consequences of its consumption. Indeed, that is precisely what the circuit court found here. Judgment, ¶46; A. 178-79.

Deceptive and fraudulent advertising, therefore, not only robs wealth from consumers and transfers it to the deceiving seller – here, Philip Morris – but also corrodes the effectiveness of markets, leading to a misallocation of resources and a diminution in consumer welfare. More resources – here, "Light" cigarettes – are produced and consumed than would otherwise be the case, and at higher prices.

Deceptive and fraudulent advertising that impacts health is even more costly to society, leading not only to a misallocation of resources, but also to externalities in the form of health care costs that must be borne individually and more generally through insurance, Medicaid, and other forms of public assistance. The true dimension of Philip Morris's conduct, therefore, must be considered in the context of its overall impact on public health in America and the public health economy.[4]

---

[4] In our brief as *amici curiae* in the Supreme Court of Illinois, we cited a series of Illinois-specific health and economic consequences of

A. The public health consequences of smoking have been devastating.

Tobacco-related illnesses are the leading cause of preventable death in the United States, killing more than 400,000 people annually. In fact, one in every five deaths in the United States is smoking related. *See* Centers for Disease Control and Prevention, *Cigarette Smoking Related Mortality, 2001.*[5] Indeed, smoking is responsible for 87% of deaths from lung cancer, 21% of deaths from heart disease, and 18% of deaths from stroke, and 80-90% of deaths from chronic obstructive pulmonary disease (emphysema and chronic bronchitis) are due to smoking. *See* Centers for Disease Control and Prevention, *Tobacco-Related Mortality, 2004.*[6] Secondhand smoke is responsible for an estimated 38,000 annual deaths in the United States, and approximately 40 million children in the United States aged 3-19 are exposed to secondhand smoke. *See* American Lung Association, *Secondhand Smoke and Children Fact Sheet.*[7]

Deaths, alone, however, do not tell the entire story. For every person who dies of a smoking-attributable disease, there are 20 people suffering from smoking-related illness. *See* Centers for Disease Control and Prevention, *Cigarette Smoking-Attributable Morbidity – U.S., 2000,* MMWR Vol. 52(35) (Sept. 5, 2003).[8]

---

tobacco use. In this brief, in an effort to convey the grievous consequences of Philip Morris's conduct, we broaden the scope of health and economic consequences to the United States as a whole.

[5] Available at http://www.cdc.gov/tobacco/research_data/health_consequences/mortali.htm.

[6] Available at www.cdc.gov/tobacco/factsheets/tobacco_related_mortality_factsheet.htm.

[7] Available at http://www.lungusa.org/site/pp.asp?c=dvluk9O0E&b=39857.

[8] Available at http://www.cdc.gov/tobacco/research_data/adults_prev/mmwr5235a4.htm.

Chronic Obstructive Pulmonary Disease ("COPD"), which includes emphysema and chronic bronchitis, is the fourth leading cause of death in the United States – and it is the only one of the top five causes of death that is increasing. Between 80% and 90% of COPD is caused by smoking. In the United States, COPD is responsible for more than 118,000 deaths annually. *See* Centers for Disease Control and Prevention, *The Health Consequences of Smoking, a Report of the Surgeon General, 2004.*[9]

Of all adults, an estimated 20.9% – over 44.5 million people in the United States – currently smoke. *See* Centers for Disease Control and Prevention, *Adult Cigarette Smoking in the United States: Current Estimates, December 2005.*[10] In addition, over 3 million high school students are currently smokers, and more than 350,000 children under 18 become daily smokers every year. *See* Centers for Disease Control and Prevention, *Sustaining State Programs for Tobacco Control: Data Highlights 2004.*[11] Based on current cigarette smoking patterns, an estimated 25 million Americans who are alive today will die prematurely from smoking-related illnesses, including 5 million people younger than 18. Centers for Disease Control and Prevention, *Perspectives in disease prevention and health promotion, smoking attributable mortality and years of potential life lost – United States, 1984*, 46 Morbidity and Mortality Weekly Report 444-51 (1997).

It is unquestionable that Philip Morris's actions have exacerbated these public health consequences of smoking. As noted above, the trial court below found that – deceived by Philip Morris's message that "Light" cigarettes were "healthier" – smokers smoked longer, they

---

[9] Available at www.cdc.gov/tobacco/sgr/sgr_2004/factsheets/4.htm.

[10] Available at http://www.cdc.gov/tobacco/factsheets/adult cigarettesmoking_factsheet.htm.

[11] Available at http://www.cdc.gov/tobacco/datahighlights/page4.htm.

smoked more frequently and drew harder, and non-smokers joined them. Judgment, ¶¶61, 69; A. 184, 186.

B. The economic consequences of smoking in the United States have been substantial and durable.

It is well established that cigarette smoking also has widespread economic consequences. According to the Centers for Disease Control and Prevention, total annual health care expenditures in the United States related to smoking are $75.5 billion. *See* Centers for Disease Control and Prevention, *Tobacco Information and Prevention Source.*[12] Lost productivity accounts for $92.4 billion. *Id.* Hence, the true cost of smoking to the health care economy is in excess of $167 billion – more than $500 per capita. *Id.* In 2002, each pack of cigarettes sold in the United States cost an estimated $7.18 in health care costs and productivity losses. *See* Centers for Disease Control and Prevention, *Annual smoking-attributable mortality, years of potential life lost, and economic costs in the United States*, 1995B1999, *MMMWR* 2002; 51:300B303.[13] It is estimated that 14% of all Medicaid expenses and 10% of all Medicare expenditures are attributable to tobacco use. LS Miller, et al., *State estimates of Medicaid expenditures attributable to cigarette smoking, Fiscal Year 1993*, 113 Public Health Reports 140-51 (1998).

II. Philip Morris's Fraudulent and Deceptive Advertising Campaign Was Pivotal to Its Strategy To Promote Smoking.

Members of the public health community have long struggled to respond effectively to the devastating health consequences of cigarette smoking and to give smokers meaningful information in the face of the well-funded efforts of the tobacco industry to continue to promote smoking. Indeed, the relative impact of industry

---

[12] Available at http://www.cdc.gov/tobacco/overview/fast_facts.htm.

[13] Available at http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf.

advertising on consumer awareness cannot be ignored. That is why the cigarette companies spend an estimated $15.15 billion annually marketing their products nationwide. Federal Trade Commission, *Cigarette Report for 2003* (2005) ("*FTC 2003 Cigarette Report*").[14]

According to the Campaign for Tobacco-Free Kids, published "research studies have found that kids are three times more sensitive to tobacco advertising than adults and are more likely to be influenced to smoke by cigarette marketing than by peer pressure, and that one third of underage experimentation with smoking is attributable to tobacco company advertising." National Center for Tobacco-Free Kids, *The Toll of Tobacco in Illinois*.[15]

The civil action brought by Plaintiffs here focuses on perhaps the most subtle and pervasive aspect of this onslaught of advertising in the form of package labeling: deception – the intentional marketing of a "Light" brand with full knowledge that consumers assumed that it was a more "healthy" cigarette, even though Philip Morris well knew that "Light" meant anything but "healthier." Eighty-five percent of all cigarettes sold in the United States are low tar or "Light" brands, and Marlboro is the most popular brand in the United States. *FTC 2003 Cigarette Report, supra.*

A. The fraudulent marketing of cigarettes as lower delivery and lower risk products is an urgent public health issue.

Amici urge this Court to be mindful of the real-world consequences of Philip Morris's fraud on the consuming public. As Monograph 13 states in its introduction:

---

[14] Available at http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf.

[15] Available at http://www.tobaccofreekids.org/reports/settlements/state.php?StateID=IL.

> The absence of meaningful differences in smoke exposure, when different brands of cigarettes are smoked, and the resultant absence of meaningful differences and risk make the marketing of these cigarettes as lower delivery and lower risk products deceptive for the smoker. The reality that many smokers chose these products as an alternative to cessation – a change that would produce real reductions in disease risks – *makes this deception an urgent public health issue.*

Monograph 13, at 1 (internal citations omitted) (emphasis added). *See also* Federal Trade Commission, *FTC Consumer Alert: Up in Smoke: The Truth About Tar and Nicotine Ratings* (May 2000).[16]

The implications of Philip Morris's fraud on public health are therefore enormous. "Many smokers switch to lower yield cigarettes out of concern for their health, believing these cigarettes to be less risky or to be a step toward quitting." Monograph 13, at 10. Philip Morris, with knowledge that "Lights" smokers do not reduce their risk of exposure to tar (and consequently do not reduce their disease risk), deceived smokers into believing that they were doing something better for their health by switching to "Lights" brands. At the trial of this case, experts for Plaintiffs, themselves distinguished members of the public health community, testified that, had smokers not viewed "Lights" as an alternative to quitting, they may have stopped smoking and actually reduced their risk of disease. *See* Testimony of Dr. Thun, R04027 ("the false perception that one is avoiding risk may cause some smokers to delay cessation"); Testimony of Dr. Burns, R04319-20) (testifying that, if smokers had not been provided alternatives to quitting, such as Marlboro Lights and Cambridge Lights, they may have quit, actually reducing their disease risk). The trial court

---

[16] Available at http://www.ftc.gov/bcp/conline//pubs/alerts/smokealrt.htm.

specifically credited this evidence in reaching its conclusions. *See* Judgment, ¶¶67-70, 78; A. 185-86, 188 (discussing testimony of Dr. Thun).

Consistent with the testimony in the trial court, the public health community has concluded that "[s]everal tactics were employed by the tobacco industry that misled consumers to perceive low-tar delivery products as safe or safer and as a viable alternative to quitting." Monograph 13, at 231. *See also id.* at 233 ("Advertisements of filtered and low-tar cigarettes were intended to reassure smokers (who were concerned about the health risks of smoking) and were meant to prevent smokers from quitting based on those same concerns.").

The trial court found that "Marlboro Lights and Cambridge Lights were health reassurance cigarettes in that they expressly and impliedly conveyed the notion of a positive health attribute through the representations of 'Lights' (with respect to Marlboro Lights and Cambridge Lights) and the representation of 'Lowered Tar and Nicotine' (with respect to Marlboro Lights)." Judgment, ¶35; A. 175-76. The devastating reality is that the market share of cigarettes sold with a tar yield of 15 mg. or less has increased from a mere 2% in 1967 to nearly 85% today. *See FTC 2003 Cigarette Report*, at Table 4. Thus, Philip Morris's "Lights" fraud contributed substantially to the public health crisis of smoking.

It is contrary to public policy for an entity to act in a way that is injurious to the health and safety of citizens. *See Metz v. Department of Professional Regulation*, 773 N.E.2d 1234 (Ill. Ct. App. 2002); *Chicago Steele Wool & Dye Fabricators Co. v. ADT Security Systems*, 763 N.E.2d 839 (Ill. Ct. App. 2002). The evidence presented at trial clearly demonstrated a course of conduct by Philip Morris that is in violation of that public policy. Indeed, the trial court found that Philip Morris's course of conduct with respect to the representations "lowered tar and nicotine" and "lights" not only offended public policy, but also was "immoral, unethical, oppressive and unscrupulous," and

"caused substantial injury to the Class members in this case." Judgment, ¶147; A. 207.

B. The Illinois trial court's findings regarding Philip Morris's fraud are supported by a growing nationwide and worldwide consensus of health authorities.

As the trial court found, "many of the experts who offered opinions on behalf of the Plaintiffs in this case are leaders in their scientific fields, and national leaders of the public health community." Judgment, ¶5; A. 168-69. Based on this expert testimony – and Philip Morris's own documents – the trial court found that "[c]ompensatory smoking behavior . . . including but not limited to inhaling deeper, more frequent puffs, larger puffs and holding the smoke in the lungs for a longer period of time . . . result in there being no difference for an individual smoker between the tar and nicotine delivery from a Marlboro Lights cigarette as compared to a regular Marlboro cigarette (the same being true of Cambridge Lights cigarettes and regular Cambridge cigarettes)." Judgment, ¶61; A. 184. The trial court further found that "Marlboro Lights and Cambridge Lights are just as harmful as regular Marlboro and regular Cambridge for all Class members in this case." Judgment, ¶66; A. 185. Indeed, the court found that Light cigarettes are *more* harmful than their regular counterparts. Judgment, ¶70; A. 186.

The conclusions reached by Plaintiffs' experts and the circuit court regarding the absence of any risk reduction from smoking Lights, and the misleading nature of that term, are now widely accepted in the public health community. A study that reviewed epidemiological data collected during the American Cancer Society's Cancer Prevention Study II concluded that "[t]here was no difference in risk among men who smoked brands rated as very low tar or low tar compared to those who smoked medium tar brands." Harris, Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8,*

British Med. J. 328:72, 2004. Even more recently, the 2004 Surgeon General's Report on Smoking and Health concluded that, "[a]lthough characteristics of cigarettes have changed during the last 50 years and yields of tar and nicotine have declined substantially, as assessed by the Federal Trade Commission's test protocol, the risk of lung cancer in smokers has not declined." U.S. Department of Health and Human Services, *The Health Consequences of Smoking, 2004*, at 324.[17]

The Canadian Government has banned the use of the terms "light" and "low tar" in Canadian cigarette advertising, concluding "that terms such as 'light' and 'mild' in tobacco marketing in Canada are both false and misleading" and that "[s]ubstantial proportions of Canadian smokers are being deceived in that they believe these products deliver less tar and nicotine and are less harmful to smokers' health. Allusions to milder taste, as well as actual taste differences, compound this deception." Pls. Ex. 59. The European Union also recently adopted a ban of such descriptors after concluding that "certain texts, such as 'low-tar,' 'light,' 'ultra-light,' 'mild' . . . may mislead the consumer into the belief that such products are less harmful." Pls. Ex. 61. Shortly after trial, in May 2003, the 192 member states of the World Health Organization completed negotiation of the world's first public health treaty, the Framework Convention on Tobacco Control, which includes a provision requiring parties to the treaty to enact legislation banning the use of any descriptor "that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as 'low tar,' 'light,' 'ultra-light,' or 'mild[.]'" To

---

[17] Available at http://www.hhs.gov/surgeongeneral/library/smokingconsequences/.

date, 168 countries, including the United States, have signed the treaty, and 140 have ratified it.[18]

Thus, the findings of the trial court in this case are consistent with a growing world-wide consensus: descriptors on cigarettes that convey a message of reduced risk are deceptive and misleading.

Further, the trial court found that "Philip Morris had specific scientific and cigarette design knowledge that the public health community did not possess related to Lights cigarettes generally as well as Marlboro Lights and Cambridge Lights cigarettes specifically." Judgment, ¶55; A. 182. The public health community has now reached a similar conclusion. As explained in the preface to Monograph 13, access to previously secret files of the tobacco industry has revealed the scope of industry efforts to endanger the public health through false advertising, and increased the public health community's awareness to the fraud of "Light" cigarettes:

> For the first time, the authors who prepared the various chapters have had extensive access to the information gleaned from the internal documents of the tobacco companies .... Included are marketing strategies that express the growing concern among the various tobacco companies of the potential loss of new recruits. This concern over the potential loss of market was due to the evolving public opinion that smoking is harmful to health and that it is related to many of the illnesses that smokers experience over the course of their lives.
>
> ***
>
> Access to internal industry papers allowed monograph authors to cite a number of tobacco company documents that show a long-term trend

---

[18] *See* http://www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en/; http://www.who.int/tobacco/framework/countrylist/en/index.html.

> altering the tar and nicotine content of cigarettes by various chemical and mechanical procedures. The documents further reveal the industry's efforts to produce cigarettes that could be marketed as acceptable to health-conscious consumers. Ultimately, these low-tar/low-nicotine cigarettes were part of the industry's plan to maintain and expand its consumer base.

Monograph 13, preface at i-ii.

III. The Divided Decision of the Illinois Supreme Court Warrants Review by this Court.

In concluding that Petitioners' action should be dismissed, the Illinois Supreme Court did not take issue with any of the well-supported findings of the trial court or the public health consequences of Philip Morris's actions as described herein. Instead, based on its own novel interpretation of federal law, it held that Philip Morris was completely immunized from liability because in the court majority's view two FTC consent decrees – with *other* cigarette manufacturers – constituted an "express authorization" of Philip Morris's campaign of deception.[19]

The majority's misinterpretation of federal law regarding the operation and legal significance of FTC consent decrees led directly to what Justice Freeman labeled in dissent "an erroneous and irresponsible interpretation" of the Illinois Consumer Fraud Act. 219

---

[19] Critically, in so holding, the majority looked to "the FTC's own published materials and cases from the United States Supreme Court and the federal courts for additional authority . . . to determine what constitutes 'specific authorization' and whether PMUSA used the terms 'lights' and 'lowered tar and nicotine' under such authority." *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 253, 848 N.E.2d 1, 43 (2005). "*Based on these other authorities*, read in conjunction with Illinois law," the Illinois Supreme Court concluded that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,'" provided it was accompanied by an appropriate disclosure. 219 Ill.2d at 265, 848 N.E.2d at 50 (emphasis added).

Ill.2d at 286, 848 N.E.2d at 61. If left standing, that interpretation will both significantly impair the FTC's ability to resolve litigation in cases involving unfair and deceptive practices – especially in the tobacco industry – and seriously undermine the State of Illinois's ability to protect its citizens while respecting the clear wishes of federal agencies – something it clearly intended to do through its Consumer Fraud Act. The discretion of federal agencies to resolve cases will have been compromised, and a sensible balance of federal and state authority will have been thoroughly disrupted.

It is imperative, therefore, that this Court grant the petition for a writ of certiorari in this case. If it does not, the public health and economic consequences of the marketing of so-called "light" cigarettes as described in this brief will continue unredressed.

CONCLUSION

From a public health standpoint, the detrimental consequences of Philip Morris's conduct have been enormous. Its brazen conduct has substantially injured the health and safety of Americans, cost our country billions of dollars, and offends the public policy.

For the foregoing reasons, *Amici* urge this Court to grant the petition for a writ of certiorari to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

JOEL J. AFRICK
PRESIDENT AND CHIEF
EXECUTIVE OFFICER
AMERICAN LUNG
ASSOCIATION OF
METROPOLITAN CHICAGO
1440 W. Washington Blvd.
Chicago, Illinois 60607
(312) 628-0220

MICHAEL W. COFFIELD
Counsel of Record
MICHAEL W. COFFIELD
AND ASSOCIATES
77 W. Wacker Dr., Ste 4800
Chicago Illinois 60601
(312) 444-9393

October 31, 2006

Counsel for Amici Curiae